DATE: SEPTEMBER 4, 1996

CASE NO: 94-INA-572

In the Matter of

JOHN C. MEDITZ
Employer

on behalf of

AMARILLA LUCIA DAVIDOVAS
Alien

Before: Huddleston, Jarvis and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from John C. Meditz's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage

and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On April 8, 1991, Employer filed a Form ETA 750, Application for Alien Employment Certification, with the New Jersey Department of Labor ("NJDOL") on behalf of the Alien, Amarilla Lucia Davidovas. The job opportunity was listed as Household Secretary. AF 5. The job duties were described as: "Domestic secretary to work in private home. Manage social, business and personal affairs for employer. Take charge of financial matters." Id. The application required two years of experience in the job or the related occupation of Bookkeeper. A special requirement indicated that references were required. Id.

After disputation between Employer and the NJDOL over the prevailing wage, the job was advertised in August, 1992. AF 47. The ad stated that references were required but only called for a resume to be sent to NJDOL, which forwarded eleven resumes to Employer. Id. After Employer received the resumes, he sent essentially the same letter, hereinafter discussed, to each applicant. AF 52, 56, 62, 71, 76, 80, 83, 89-90, 95, 98, 104. Some applicants received a second letter. AF 51, 61, 70, 75, 88, 103. On October 23, 1992, Employer filed a Report of Recruitment with NJDOL. AF 116. The report stated that none of the applicants were hired. Each was rejected on the ground that: "No references were received." AF 107-109. In some instances, other reasons were given. Id. The application was then transmitted by NJDOL to the CO. AF 125.

On October 7, 1993, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application. AF 129. The CO found that: Because of the wording of the ad, applicants could not be expected to submit references along with their resumes. AF 128. It is not a normal practice for an applicant to submit references before an interview. AF 127. The follow-up letters sent to each applicant appear to give a "chilling effect" to U.S. applicants through the appearance of undue complexity and intimidation and that they did more to discourage rather than encourage pursuit of the employment opportunity by qualified U.S. workers. Id.

The NOF found that the following portion of the letter sent to each applicant to be unnecessary, misleading and intimidating:

> "The job opportunity is being offered through the New Jersey Department of Labor, and they have assisted me to recruit for a household secretary. The job opportunity, and its requirements have been reviewed by labor department specialists and compared with the job description and requirements in the Dictionary of Occupational Titles. Both the job description and the requirements have been found to be normal within the United States. The requirements include the submission of references to complete the job application procedure." AF 127.

The CO stated that: "It is held that this statement was unnecessary, misleading, and intimidating to the average applicant. References are not a requirement of the Department of Labor, they are an option which the employer may require." Id.

The NOF also found two other parts of the letter to be intimidating.

- With reference to the employer's request for "detailed information" about the applicant's current and previous employers, the employer stated, "This information is required to do a thorough background check."

- The employer completed each of his letters stating, "In order to complete this application for employment as a household secretary, I ask that you reply in writing and provide the stated information and documentation. A written reply is necessary so that I can have a permanent record of all my communications with you. I will then transmit copies of all documentation and communications to the New Jersey Department of Labor as required by Federal Regulations."

The latter two statements are also found to be intimidating in that they give more of an appearance of a governmental security investigation than a reference check for a "Household Secretary". Id.

The NOF also found a discrepancy between information furnished by applicant Vilanova and Employer. AF 126. Additionally, it found that Employer stated that the resumes of applicants Costigan, Girgis and Stenman were not current and that: 1. Applicant Girgis' resume appeared to be current. 2. Although the Costigan and Stenman resumes were missing the

last 15 and 5 months, respectively, they evidenced that the applicants possessed the qualifications required for the job. AF 126. Employer was required to rebut the findings. Id.

After an extension of time, Employer filed his rebuttal on January 19, 1994. AF 151. It consisted of a cover letter by Employer's counsel which contained supporting arguments and the following documents: 1. An affidavit by Employer which addressed the discrepancy of information between him and applicant Vilanova and stated his reasons for requiring references. AF 148-49. 2. A letter from the Acting Public Safety Director of the Township of Weehawken, New Jersey to Employer which stated that "In the case of in-house workers, we recommend that you check the references of all job applicants before meeting with them in your home." AF 147. 3. A letter to Employer from the Mayor of Weehawken stating that "identification cards and references should be checked for house workers and other employees before they are admitted to the premises." AF 146. 4. Letters from the Employment Security Commission of North Carolina and the Department of Labor Employment and Training Administration (Boston Office) with respect to using the DOT by individuals seeking jobs. AF 142-45.

On January 21, 1994, the CO issued a Final Determination which denied certification. AF 155. The CO found that Employer had failed to rebut the findings of the NOF and that Employer did not make a good faith effort to recruit U.S. workers. AF 152-54. Employer filed a Motion for Reconsideration (AF 166) which was denied by the CO. AF 167. Employer filed a timely notice for review (AF 168) and a brief.

Discussion

The Board has held that the requirement of a good faith effort to recruit qualified U.S. workers is implicit in the regulations found at Title 20 of the Code of Federal Regulations, Part 656(h)(c). La March Ente, Inc. 87-INA-607 (October 27, 1988). In addition, "An employer may not place unnecessary burdens on the recruitment process. See Lin and Associates, 88-INA-7 (Apr. 14, 1989)(en banc). And, of course, an employer may not discourage U.S. applicants. See Vermillion Enterprises, 89-INA-43 (Nov. 20, 1989)." Berg & Brown, Inc., 90-INA-481 (Dec. 26, 1991).

Employer argues that everything in the follow-up letter sent to all applicants was true. The letter was written in clear and simple English. The applicants were applying for a job as a secretary and they should have been capable of reading the letter and responding intelligently to it and that the letters did not have a chilling effect. AF 163-66. There is no merit in Employer's position.

The reference to the DOT in Employer's follow-up letters was unnecessary and intimidating. Whether or not a job seeker might want to use the DOT in determining occupations upon which to focus in a job search, it has little direct significance for the applicant in an alien labor certification proceeding.[1] The U.S. applicant is responding to a published or posted notice about the job opening. Employer's job description and requirements are contained in the notice and constitute the minimum job description. Rejection of a U.S. worker for not meeting unspecified requirements constitutes a rejection for an unlawful, non job-related reason under §656.21(b)(6). East-West Research, Inc., 94-INA-449 (June 10, 1996), Bo Packing, 94-INA-443 (Feb. 6, 1996). Referencing an applicant to the DOT job description, which might be more extensive than that in the Form ETA 750, as in this case, tends to discourage and intimidate U.S. applicants. Compare AF 5 with DOT 201.162-010.

We also hold that the CO correctly found that the statements in Employer's follow-up letters which required detailed information about the applicants' present and previous employers "to do a thorough background check" and that copies of all documentation and communications would be sent to NJDOL "as required by Federal Regulations" were intimidating in that they gave the appearance of a governmental security investigation rather than a reference check by Employer . AF 127.

The phrase "thorough background check" connotes more than verification of references. "Background" is defined as: "4. a person's origin, education, experience, etc., in relation to his present character, status, etc." The Random House College Dictionary (Revised Edition), p. 99. "Check" is defined as: "4. to investigate or verify as to correctness. 5. to make an inquiry into, search through, etc. ... 16.U.S. to make an inquiry, investigation as for verification." Id. at p. 228; see, e.g., Florida Stats, 1995, Chapter 397, Section 397.311(4).

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[1] Of course the CO and state employment agency refer to the DOT in classifying the job to determine the prevailing wage and whether the job, education and experience requirements are consonant with it. The letter from the Employment Security Commission furnished by Employer as part of his rebuttal states: "We do not construe this comment to mean that the DOT and SVP ratings were intended for direct usage by U.S. workers who seek employment. However, jobseekers benefit when those assisting them have relevant information about duties and requirements of occupations." AF 145.

The letters did not state who would conduct the thorough background check and the language about transmitting all documents and communications to DOL as required by Federal Regulations appears to have been designed to create the impression of a governmental security investigation. They were intimidating.

Employer contends that all applicants were properly rejected because none of them submitted references. He argues that: "The requirement of the reference is a legal requirement that is at the heart of the recruitment process. The job applicants had an affirmative duty to provide a reference, since the requirement was listed on the ETA form and in the ad." AF 164. He also contended that it was normal and necessary to have the references before interviewing any applicant in his house. AF 149.

We note that the word "reference" has different shades of meaning. It is defined as: "6. a person to whom one refers for testimony as to one's character, abilities, etc. 7. a statement, usually written, made by this person. The Random House College Dictionary (Revised Edition), p. 1108. It is common practice in responding to a request for references to provide a list of persons with their addresses who may be contacted by the employer. Webster's Secretarial Handbook (Second Edition), pp: 13, 18, 19; Clinica Veterinaria, 88-INA-523 (June 20, 1990). In today's litigious society, some employers will only provide dates of employment and job titles in response to a reference referral. Johnson, Why References Aren't, N.Y. Times, June 9, 1985, Sec. 3, p. 8; Baer, Employee Defamation and Job References, N.Y.L.J., January 12, 1988, p. 1. However, we need not tarry over this issue since each case must be determined on its particular facts.

Employer's argument that references were required before he would interview any applicant because of personal security reasons has no merit. The resumes of applicants Vilanova, Rivera, Nesmith, Montes, Gonzalez, Depalma, Costigan, Cabrera and Bass, contained detailed information (although not in the draconian form required by Employer) which would have enabled the Employer to verify previous employment history. AF 50, 58-60, 67-69, 74, 79, 87, 94-5, 99, 100-02; Clinica Veterinaria, 88-INA-523 (June 20, 1990). Furthermore, "Employer's security concerns cannot stand as a bar to U.S. applicant contacts in this labor certification proceeding." Peggy Loiacono, 93-INA-138 (April 8, 1994).

Employer sent second follow-up letters to six U.S. applicants which required them to provide the following:

> Please be advised that a reference is required. The reference letter should be written on letterhead from the place where you have been employed.
>
> The letter should also state the duties which you have performed and document at least two years experience in the job opportunity.
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> The letter should state the month and year when you began and the month and year when you ended; the numbers of hours you worked per week; the name and address of the employer; the type of establishment; the name of the job; the duties performed; and the name, title, and telephone number of your supervisor.
>
> Once we receive this information, we can determine whether you appear to be qualified and whether an interview is appropriate.
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> . . . .
>
> P.S. The letter should also state under what circumstances you are terminating your current employment. AF 51, 61, 70, 75, 88, 103.

In addition, applicant Nesmith, who submitted a letter of reference, was told to go back to the person giving the reference and have her write another letter with the details required by Employer and to provide Employer "with detailed information as to your work activities, since you began working. This information will presumably refer back to 1988, when you graduated from Henry Snyder High School." AF 70.

It is customary for an employer to check the references given by an applicant by contacting the persons or firms listed. Al-Lee Contractors, 87-INA-651 (Jan. 7, 1988). In this case, Employer has shifted this function to the applicants. The second follow-up letter required the applicants who received it to obtain detailed verification in letters from previous employers which were on letterhead stationary of that employer. The CO correctly found that the letters gave the appearance of undue complexity and intimidation which seemed to discourage U.S. applicants and had a chilling effect upon them. AF 153.

We hold that alone, or in combination with each other, the following actions by Employer were intended to discourage U.S. applicants, had a chilling effect on them and constituted bad faith recruitment: 1. Employer's reference in the follow-up letters about the DOT. 2. Employer's reference in the follow-up letters about a thorough background check and that all documents would be sent to DOL as required by Federal Regulations. 3. The excessive requirements and burden placed on U.S. applicants in Employer's second follow-up letter, Al-Lee Contractors, 87-INA-651 (Jan. 7, 1988); Percy Solotoy, 92-INA-331 (Nov. 9, 1993); Technits, Inc., 92-INA-1 (May 12, 1993); Therapy Connection, 93-INA-129 (June 30, 1994); Riverdale Avenue Corp., 92-INA-171 (March 17, 1993); Berg & Brown, Inc., 90-INA-481 (Dec. 26, 1991).

The CO correctly determined that Employer did not recruit U.S workers in good faith. No other points require discussion.

ORDER

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

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